84-1874

Office-Supreme Court, U.S.
F I L E D
APR 29 1985
ALEXANDER L. STEVAS,
CLERK

No.

IN THE SUPREME COURT OF THE
UNITED STATES

SPRING TERM 1985

JAMES O. BEEKER AND SYLVIA P. BEEKER,

Petitioners,

v.

Commissioner of Internal Revenue
~~UNITED STATES OF AMERICA,~~

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE NINTH CIRCUIT COURT
OF APPEALS

James O. Beeker
Sylvia P. Beeker
Petitioners, Pro Se
4648 West Frier Dr.
Glendale, AZ 85301

QUESTIONS PRESENTED

I.

PETITIONER/APPELLANTS HAVE A VALID CLAIM TO QUESTION THE SENDING OF THE STATUTORY NOTICE OF DEFICIENCY PURPORTEDLY SENT MARCH 22, 1983 BY DEFENDANT APPELLEE.

A. Petitioner/Appellants assert that although the I.R.S. purportedly sent the Statutory Notice of Deficiency March 22, 1983, it was never received by their local post office. It is assumed it was sent addressed to their last known address at which they have lived for the last twelve years.

B. Petitioner/Appellants believe Respondent/Appellees argument that the courtesy copy mailed to the Petitioner/Appellants October 13, 1983, to be Ab inconventie.

C. Respondent/Appellees state that because said statutory Notice of Deficiency was mailed by certified letter #793509, to Petitioner/Appellants last known address, that there existed no question of whether they received it or not.

D. Respondent/Appellee can only prove it was sent and received by the downtown postal station.

E. Petitioner/Appellants have a letter from the Postmaster of their local Glendale post office stating it was never received by that post office.

IN THE SUPREME COURT

OF THE UNITED STATES

SPRING TERM 1985

JAMES O. BEEKER AND SYLVIA P. BEEKER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A writ of certiorari is respectfully sought to review the Court of Apeals Order affirming the conviction of the Petition in a civil case entered on 12/14/84.

TABLE OF CONTENTS AND AUTHORITIES

	Page
Questions Presented	
Table of Contents and Authorities	i-ii
Opinions Below	1
Jurisdiction	2
Statement of the Case	3
Reasons for Granting the Writ	4
I.	5
Conclusion	19
Cases:	
Austin v. Voskuil (1980, ED MO) 493 F.Supp 780	7
Harold Garmany v. Dwight Baptist (1979, DC, Ala)	11
United States v. Ahrens, 530 F.2d 781 (1976)	15

Statutes:

26 U.S.C. § 6212 #93	11
26 U.S.C. § 6212(a),(c)	6, 8,11
26 U.S.C. § 6213(a)	6, 8,11
26 U.S.C. § 6212(b)(1)	17
28 U.S.C. § 1254 (1)	2

Attachments:

Appendix A	23
Appendix B	27
Appendix C	33
Appendix D	34

OPINION BELOW

The Order and Judgment of the Court of Appeals affirming the civil convictions of the Petitioner appears in Appendix A.

JURISDICTION

The Jurisdiction of this court for review of the decision made by the 9th Circuit Court of Appeals is invoked under 28 U.S.C. 1254(1). The Motion for Reconsideration was denied on January 29, 1985 (appendix D.).

STATEMENT OF THE CASE

I. Petitioners/Appellants are not required by law to respond to a Statutory Notice of Deficiency which was never received, although purportedly sent as there exists a question as to its' receipt at the Glendale Post Office.

REASONS FOR GRANTING THE WRIT

I

Petitioners/Appellants have a valid claim to question the sending of the Statutory Notice of Deficiency purportedly sent March 22, 1983, by Respondent/Appellee.

REASONS FOR GRANTING THE WRIT

I.

DO PETITIONERS/APPELLANTS HAVE A VALID CLAIM TO QUESTION THE SENDING OF THE STATUTORY NOTICE OF DEFICIENCY PURPORTEDLY SENT MARCH 22, 1983, BY RESPONDENT/APPELLEE?

Petitioners/Appellants have lived at the same address for a period of twelve years. Petitioners/Appellants were audited in February of 1979. They did not receive any notification form the I.R.S. of any deficiency in taxes until September 5, 1983. This was six months after the statute of limitations expired. On October 15, 1983, the Petitioners/Appellants received a courtesy copy of a Statutory Notice

of Deficiency purportedly mailed March 22, 1983. This was the Statutory Notice of Deficiency never received by the Petitioners/Appellants. On December 19, 1983 the Postmaster of Glendale, Arizona Post Office stated in a letter, "our records do not indicate the receipt or delivery of Certified Letter No. 793509 mailed March 22, 1983 to Jim Beeker. The Respondent/Appellee contends that because the Petitioners/Appellants are listed by the I.R.S. as having been mailed the Statutory Notice of Deficiency at their last known address that that is in fact evidence enough. However, 26 U.S.C. § 6212(a), (c), 6213(a) state:

> Notice of deficiency to taxpayer is not proper where a taxpayer never lived at address to which notice was sent, taxpayer had not authorized anyone at that address to accept mail, taxpayer did not in fact receive notice of deficiencies and the I.R.S. did not actually locate taxpayer; thus, taxpayer is entitled to injunction against the I.R.S. in deficiency proceedings, Austin v. Voskuil (1980, ED MO) 493 F.Supp 780. (emphasis added.)

If in fact the I.R.S. did mail the purported Statutory Notice of Deficiency it was not received by the Glendale Post Office nor by the Petitioners/Appellants. As such the 90 days would have run out (the time limit for Petitioners/Appellants to file suit in Tax Court) on July 19, 1983. Why were Petitioner/Appellants not contacted prior

to September 5, 1983? Why didn't the I.R.S. send the notice of alleged taxes sooner? If in fact the I.R.S. did not make a mistake and not mail the Statutory Notice of Deficiency then why were they not more timely in contacting the Petitioners/Appellants. It says in 26 U.S.C. § 6212 (a),(c), 6213(a):

> . . .,taxpayer did not in fact receive notices of deficiency and I.R.S. did not actually locate taxpayer; thus, taxpayer is entitled to injunction against I.R.S. in deficiency proceedings. . . .

The Respondent/Appellee contends that: It is the general procedure of the Internal Revenue Service, upon mailing of certified mail to taxpayer, to not request a return receipt. This is for the reason

that the appropriate regulations and statutes do not specifically require that certified mail be received, but only that it be mailed certified to the taxpayer.

Since the I.R.S. does not request return receipt then if Petitioners/Appellants did not claim the certified mail it would have gone back to the I.R.S. The fact of the matter is it never made it to Petitioners/Appellants local post office. In a letter dated December 19, 1983 E. G. Figueroa, Postmaster of the Glendale, AZ Post Office wrote a letter stating their records did not show receipt of Certified Letter No. 793509 mailed March 22, 1983, to Jim Beeker.

In a weak argument against facts the Defendant/Appellees state in their Motion to Dismiss:;

> "The Post Master went on to further explain that their records do not, in all cases, accurately reflect whether certified mail has been delivered or received."

Well, perhaps not in all cases do the certified letters listed on the I.R.S. postal sheets make it from the I.R.S. to the addressee. The fact that the post office can say in a letter that they never received the certified letter and the Petitioners/Appellants never received the letter and all the Respondent/Appellees can do is allege they sent it. It would seem more factual to say that perhaps as the records show the certified letter

actually was lost either before it got to the Phoenix post office or in transit from the downtown post office to the Glendale post office. Petitioners/Appellants believe there is a serious question here in regards to their not receiving the Statutory Notice of Deficiency mailed March 22, 1983.

26 U.S.C. § 6212(a),(c), 6213(a)

#93 Miscellaneous considerations

I.R.S. motion to dismiss suit to enjoin collection of tax is not granted when there is question whether 90-day letter was sent to taxpayers last known address.

Harold Garmany v. Dwight Baptist (1979, DC Ala)

There is a question whether or not the Statutory Notice of Deficiency ever reached the Glendale Post Office. They have no record of it, is that not question enough. There is some record of it possibly being received at the downtown post office but that is also tenative in regards to Respondent/Appellees own statement. . . that their records do not, in all cases, accurately reflect whether certified mail has been delivered or <u>received.</u>

Respondent/Appellee has gone on to say:

> "Petitioners allege that they did not receive the statutory notice on or about March 22, 1983, however, the Postal Service's statement that they

> have no records of whether it was delivered or received is not conclusive."

They go on to state:

> "Whether Petitioners, in fact, received the statutory notice of deficiency or whether the Postal Service, in fact, delivered the certified mail on March 22, 1983, is immaterial."

Petitioners/Appellants believe they have a right to question this matter in terms of being "inconclusive" or "immaterial". Defendant/Appellee say the Internal Revenue Service complied with all the statutory requirements by delivering the certified mail to the United States Postal Service and could <u>assume</u> that it would be properly mailed. If such were the case we can <u>assume</u> Petitioners/Appellants have also complied with the statutory

requirements upon receipt of the Statutory Notice of Deficiency by filing in Tax Court. Petitioners/ Appellants did not receive the Statutory Notice of Deficiency. Why should the burden of proof be put upon their shoulders in proving they did not receive it? In regards to the fact it was not received at the Glendale Post Office should not the burden of proof be upon the Postal Service? In which case we have the word of an individual against that of two government agencies. Where are the rights of the individual citizens of this country when issues of burdens of proof arise. The question here is whether or not the certified letter ever

reached the Glendale Post Office, in which case, Petitioners/Appellants have worthy cause to question the decision of the lower court in this matter.

Respondent/Appelee cited case law from United States v. Ahrens, 530 F.2d 781 (1976). In many instances this case is unrelated to Petitioners/Appellants for the following reasons:

> a.) Statutory Notice of Deficiency in this case was mailed to the taxpayer and his attorney.
> (emphasis added.)

Petitioners/Appellants have no lawyer, the said notice was mailed to them and them only.

> b.) ". . . Government proved as a matter of law, in absence of any rebuttal evidence on

behalf of taxpayer, that notice of deficiency was mailed." In this case the Petitioners/ Appellants have refuted the I.R.S. claim that notice was mailed.

c.) Where taxpayer. . .did not dispute fact that post office form offered by government. . .such form was admissable into evidence. Petitioners/Appellants question the admissability of such evidence in said case, when Petitioners/Appellants also entered "admissable" evidence in the form of a letter from the Glendale Post Office stating they have no record of receiving or delivering the said notice. Petitioners/Appellants did refute the receipt of said notice in a letter to President Ronald Reagan, The Honorable Bob Stump and The Honorable George Hansen dated September 8, 1983.

d.) In cited case law the taxpayer who was sent the Notice of Deficiency was in Vietnam. Petitioners/Appellants have lived at the same address for the last twelve years and have not moved and were not absent when said notice was

mailed to them in March of 1983.

e.) The government in cited case also offered deposition testimony of Attorney McGowan who stated that he recalled having possession of a Notice of Deficiency with respect to Aherns taxes. Petitioners/Appellants have no such lawyer, nor does anyone have a copy except the Internal Revenue's said courtesy copy of which the date is stamped, not typed on, and the certified mail number is written in pen. No one can prove conclusively that said notice is the one allegedly sent in fact, but only by allegation. In this case the Respondent/Appellee alleges they sent notice Petitioners/Appellee alleges it was lost before being delivered to the Glendale Post Office.

The question here is not whether Petitioners/Appellant did receive the Statutory Notice of Deficiency simply because the I.R.S. mailed it;

26 U.S.C. § 6212(b)(1):

under that section, notice is sufficient if it is sent

> to the address where the Commissioner reasonably believed the taxpayer wished to be reached. . . . .

The Petitioner/Appellants have lived at the same address for the last twelve years and on March 22, 1983, did not receive said notice mailed by the Commissioner nor did their local Post Office receive said notice. The question is two fold in this matter. Did the I.R.S. actually mail said Statutory Notice of Deficiency or did the said notice get lost in the mail before ever reaching the Glendale Post Office? Petitioners/Appellants believe that the letter from their local post office is conclusive and material evidence that the said notice did not reach them. Petitioners/Ap-

pellants believe that any Judge who would over look this conclusive evidence of question in said case is in fact biased in view of the Respondent/Appellee. Again, Petitioners/Appellants ask why the burden of proof has so blatantly been placed upon their shoulders, a burden which they've met anyway.

CONCLUSION

If at this time the Petitioners/Appellants have not succeeded in convincing this court that there is substantial evidence to question the alleged Statutory Notice of Deficiency, then they have only failed in regards to expressing a very pressing and monumental injustice that has been placed upon

them. The Respondent/Appellee has repeatedly stated that they are without a doubt going to prevail in this case because they were within the boundaries of the statutes and codes. What they have failed to address consistently is their responsibility to provide proof that perhaps the failure of the intermediate agency i.e. the United States Postal Service could have been at question here, and not the Petitioners/Appellants. Why should the Petitioners/Appellants be made responsible for the mistakes of large government agencies? It is very possible that the I.R.S. was negligent in the mailing of the Statutory Notice. How can a government agency

immediately place blame upon the individual? Should it not be <u>both</u> parties that should answer for the undelivered notice. If in fact the Postal Service lost said piece of mail, would it not be reasonable to expect both parties to investigate that possibility? The Petitioners/ Appellants did in fact talk with the postal service and get verification in regards to said notice. What actually did the Internal Revenue Service do, except state that they sent it and that they have documentation stating it left their office. What about the question of its non-receipt at the Glendale Post Office? Why didn't the I.R.S. send a tracer out on the alleged

certified letter of March 2, 1983; they sent it? If the shoe were on the other foot you can be sure the Petitioners/Appellants would have tried to discover the whereabouts of the certified letter, especially since there exists a missing link in regards to its mailing route. Petitioners/Appellants beg this court to review the circumstances of this missing Statutory Notice and to reverse the ruling of the Ninth Circuit Court of Appeals, sending the instant case back to the lower court for a rehearing on the question of validating the alleged notice of deficiency.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES O. BEEKER and SYLVIA P. BEEKER,	)	No. 84-1730
Plaintiffs-Appellants,	)	D.C. # CV-83-2314-WPC
vs.	)	MEMORANDUM*
COMMISSIONER OF INTERNAL REVENUE,	)	
Defendant-Appellee.	)	

Appeal from the United States
District Court for the
District of Arizona
William P. Copple,
District Judge, Presiding
Submitted November 8, 1984**

BEFORE: SCHROEDER, FERGUSON, and NELSON, Circuit Judges.

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

**The panel finds this case appropriate for submission without argument pursuant to 28 U.S.C.A. 9th Cir. R. 3(f) and Fed. R. App. p. 34(b).

James O. and Sylvia P. Beeker appeal the district court's grant of summary judgment in favor of the Commisioner of Internal Revenue in their action to enjoin collection of certain income taxes. The judgment of the district court is affirmed.

The Beekers contend that, because they never received the statutory notice of deficiency, the Anti-Injunction Act exemption found in

26 U.S.C. § 2613(a) is applicable. The notice of deficiency, however, is effective if properly mailed, regardless of whether the taxpayer actually receives it. See Wilson v. Commissioner, 564 F.2d 1317, 1319 (9th Cir. 1977), cert. denied sub. nom. 439 U.S. 832, 99 S. Ct. 110, 58 L.Ed. 2d 127 (1978).

The Beekers also contend that they were denied due process because they did not receive actual notice of the deficiency until after the 90-day period for filing a petition in the tax court had expired. It is well settled, however, that loss of this opportunity is not a denial of due process because the taxpayer may pursue alternative remedies. See ID.; Cohen v. United States,

297 F.2d. 760, 772 (9th Cir. 1962). In this case, the Beekers may proceed by paying their taxes and filing a claim for a refund. If they are denied a refund, they can file a claim in the district court or the court of claims. Id.

The judgment of the district court is affirmed.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES O. BEEKER, and SYLVIA P. BEEKER	)	D.C. # CIV-83-2314
Plaintiffs-Appellants,	)	ARIZONA, PHOENIX DIVISION
v.	)	
COMMISSIONER OF INTERNAL REVENUE	)	C.A. # 84-1730
Defendant-Appellee.	)	MOTION FOR RECONSIDERATION

Appeal from the United States
District Court for the
District of Arizona
William P. Copple,
District Judge, Presiding
Submitted November 8, 1984

BEFORE: SCHROEDER, FERGUSON AND NELSON, Circuit Judges.

James O. and Sylvia P. Beeker, Plaintiffs-Appellants, in the above

numbered case request a rehearing based on the following issues of fact:

1. The Beekers have contended from the begining that the IRS did NOT mail the statutory notice of deficiency. Note item 4 in the original complaint, Exhibit A attached.

2. The Beekers contend that U.S. Postal Service form PS Form 3877, Exhibit B attached, is insufficient proof that any mailing arrived at the Post Office.

3. The Postal Service employee who signed Exhibit B, Mr. Robert Ramirez, has given us an Affidavit which invalidates Exhibit B as proof of mailing, see Exhibit C, attached.

4. The Postmaster of the Glendale Post Office has written us a letter stating that he has no record of ever receiving or delivering the statutory notice of deficiency, Exhibit D, attached.

The Postal clerk at the Office of origin cannot testify that he

received the mailing, and the Office of destination has no record of the disputed mailing.

THEREFORE, the preponderance of evidence clearly shows that IRS failed to get the statutory notice of deficiency to the post office.

FOR THESE REASONS, Plaintiffs-Appellants pray that this Court will reconsider the facts in this case, will overturn the judgment of the Federal District Court and will render a decision favorable to them.

Respectfully submitted this 29 day of December 1984.

James O. Beeker
Plaintiff-Appellant
4648 W. Frier Drive
Glendale, AZ 85301
602-934-7458

Sylvia P. Beeker
Plaintiff-Appellant

4. The Commissioner of Internal Revenue Service has never properly issued a statutory Notice of Deficiency as required by 26 U.S.C. Section 6212 and therefore Plaintiffs, by law, have never been notified of the deficiency assessed against them, in violation of their legal and Constitutional rights.

WHEREFORE, Plaintiffs pray:

1. That this Court will recognize that the Statute of limitations has expired on the action taken by the Commissioner of Internal Revenue Service, or one of his agents;

2. That this Court will enjoin the Commissioner and his agents from further efforts to collect alleged taxes due in violation of the statute of limitations;

3. That this Court will enter an order releasing the lien on Plaintiffs property;

4. This Court will award Plaintiffs their costs and fees incurred in this matter pursuant to the provisions of 26 U.S.C. Section 7430;

5. That this Court will award Plaintiffs such other and further relief as this court deems just and appropriate in the circumstances.

Dated this 30 day of November, 1983.

James O. Beeker
JAMES O. BEEKER
Plaintiff, Pro Se
4648 West Friar Drive
Glendale, Arizona 85301

Sylvia P. Beeker
SYLVIA P. BEEKER
Plaintiff, Pro Se

BEST AVAILABLE COPY

Exhibit B

BEST AVAILABLE COPY

APPENDIX C

UNITED STATES
POSTAL SERVICE

Glendale, AZ 85301-9998

December 19, 1983

To Whom It May Concern:

As of this date, our records do not indicate the receipt or delivery of Certified Letter No. 793509 mailed March 22, 1983, to Jim Beeker.

Sincerely,

E.G. Figueroa
Postmaster
Glendale, AZ

EFG:jl

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES O. BEEKER and SYLVIA P. BEEKER, Plaintiffs-Appellants, vs. COMMISSIONER OF INTERNAL REVENEU, Defendant-Appellee.	)	No. 84-1730 D.C. # CV-83-2314-WPC (District of Arizona) ORDER

Before: SCHROEDER, FERGUSON, and NELSON, Circuit Judges.

The panel as constituted above has voted to deny the motion for reconsideration.